

The New Sales & Use Tax Law

The Georgia General Assembly provides some clarity to Georgia's Sales & Use Tax Law with passage of HB 306 (Effective July 1, 2005)



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UNDER Georgia Law, a private contractor assumes the "sales and use" tax liability (actually the "use" tax) on the fair market value for equipment or material purchased by a tax-exempt government entity, if they install such equipment or materials on behalf of the governmental entity, *unless the equipment/material is part of a gas, water or sewer project*. Therefore, even if the public owner is tax exempt, and makes the purchase on a tax exempt basis, the contractor receiving and installing the owner furnished materials or equipment becomes the consumer of the materials and becomes liable for payment of the tax if the purchasing entity did not pay the "sales" tax. This law has not been clearly understood among the public owner, designer or contractor community. For years, many of these groups have incorrectly assumed the tax exemption flowed down to the contractor installing on behalf of the governmental entity for all public works construction projects, not just water, gas or sewer projects.

During the 2005 Legislative Session, Georgia Branch, AGC initiated an effort to bring more clarity, fairness and balance to this issue. Our initial legislative proposal (HB 306) suggested that all public works projects (i.e. schools, jails, roads etc.) receive the same exemption enjoyed by water, gas and sewer projects, namely that owner furnished materials and equipment not be taxable to the installing contractor.

Under Georgia's legislative rules, all tax legislation that potentially impacts Georgia's tax revenues must first undergo a fiscal impact study, before being able to receive a hearing in the legislative committee of reference. The fiscal impact study done on HB 306 as originally drafted indicated that our proposed legislation would result in a loss of state tax revenue in excess of \$200 million per year. As a result of this staggering figure and Georgia's tenuous financial condition, it was determined that our proposed legislation, as drafted, was not feasible at this time. Therefore, Georgia Branch, AGC began working on a substitute provision with all of the stakeholders including legislative leadership, the Department of Revenue (DOR), various state agencies, the Association County Commissioners of Georgia (ACCG) and the Georgia Municipal Association (GMA) that

would still bring more clarity and fairness to this issue.

The House Ways and Means Committee passed a committee substitute to HB 306, which allows governmental entities to continue purchasing equipment and material tax exempt. However, if the public owner furnishes the equipment or material to the contractor to install on their behalf which will be "used up and consumed" in the performance of and "physically incorporated" into the work, and no prior tax has been paid, **the public entity shall issue advance written notice to such contractor of the amount of tax owed for such tangible personal property. The failure of the governmental entity to advise the contractor of this tax liability shall render the governmental entity responsible for the tax.** This notice requirement only applies to state and local governmental entities. **The federal government is not bound by these new provisions.**

This version of HB 306 was passed by the full House and Senate and signed into law by Governor Perdue on May 2, 2005 (Act # 83). **HB 306 became effective on July 1, 2005** and should allow all parties in the construction process to have a better understanding of their rights and obligations under this new Georgia tax law.

If the public owner is tax exempt, and makes the purchase on a tax exempt basis, the contractor receiving and installing the owner furnished materials or equipment becomes the consumer of the materials and becomes liable for payment of the tax if the purchasing entity did not pay the "sales" tax.

Georgia Branch, AGC will continue our efforts with DOR in the development and implementation of their regulation to enforce this new law. We hope that the regulation will clarify exactly which items are taxable and which ones are not, because there remains some confusion on this issue. We also hope to standardize the means by which the governmental entity must provide advance written notification of the tax liability on public works projects where the tax exempt material/equipment is provided to the contractor for installation.

In the interim, if you are installing **any** owner purchased material or equipment which is to be used and consumed in the performance of the work or physically incorporated into the work, make sure you are provided advanced written notice of the tax liability for those items. This tax should be included in the cost of your bid or proposal to install. If the public owner insists that no tax is to be charged for installation of a particular item, make sure you have appropriate contract language that requires the

public owner to reimburse you for the tax, if that item is later determined to be taxable.

Georgia's DOR has recently indicated that they may waive interest and penalty in collecting past due tax on prior violations of the law that may have occurred before the effective date of HB 306. Please consult your tax adviser and/or attorney to navigate your best course of action, if you find yourself in this type of situation.

Georgia Branch, AGC will continue to publish information about this new law and its provisions to our friends in the public owner, architect and engineer communities. ■

If you have any questions concerning Georgia's new sales and use tax rules, contact Mark Woodall, Director of Governmental Affairs at the Georgia Branch, AGC at 678.298.4116 or woodall@agcga.org.



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HB 306: What it Says

Listed below is the full text of HB 306 as passed by the Georgia General Assembly and signed in law by Governor Perdue Act # 83.

05 HB 306/AP House Bill 306

(AS PASSED HOUSE AND SENATE)

By: Representatives Rice of the 51st, Ehrhart of the 36th, and Burkhalter of the 50th

A BILL TO BE ENTITLED AN ACT

To amend Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to sales and use taxes, so as to change certain provisions regarding payment of such tax with respect to certain tangible personal property; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to sales and use taxes, is amended in Code Section 48-8-63, relating to payment of sales and use tax by contractors, by adding a new subsection immediately following subsection (f) to be designated subsection (g) to read as follows:

(g)(1) Nothing contained in this Code section shall be construed to impose any sales or use tax with respect to the use of tangible personal property owned by the State of Georgia, the University System of Georgia, or any county, municipality, local board of education, or other political subdivision of this state in the performance of contracts with such entities when the property is not actually used up and consumed in the performance of the contract. Tangible personal property incorporated into real property construction which loses its identity as tangible personal property shall be deemed to be used up and con-

sumed within the meaning of this subsection. Any governmental entity which furnishes tangible personal property to a contractor for incorporation into a construction, renovation, or repair project conducted pursuant to a contract with such governmental entity shall issue advance written notice to such contractor of the amount of tax owed for such tangible personal property. The failure of the governmental entity to issue such advance written notice to the contractor of such tax liability shall render such governmental entity liable for such tax.

(2) This subsection shall not apply with respect to the use of tangible personal property owned by the United States.

SECTION 2.

All laws and parts of laws in conflict with this Act are repealed. ■



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